

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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GEORGE I. OJEISEKHOBBA,

Plaintiff,

v.

I.C.E. and HENDERSN DETENTION
CENTER MEDICAL STAFF,

Defendants.

Case No. 2:12-cv-01529-MMD-VCF

ORDER

Plaintiff, an individual detained in the Henderson Detention Center on an immigration hold, filed his application to proceed *in forma pauperis* and his original civil rights complaint on August 28, 2012 (dkt. no. 1). Almost immediately thereafter, plaintiff moved to file an amended complaint (dkt. no. 2). The Court granted his *in forma pauperis* application, but ordered payment of an initial installment toward the fee and granted the motion to amend (dkt. no. 3). The amended complaint has been filed (dkt. no. 4) and the initial installment has paid (dkt. no. 5). The amended complaint is subject to the provisions of the Prisoner Litigation Reform Act as discussed below.

I. SCREENING PURSUANT TO 28 U.S.C. § 1915A

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a

1 claim upon which relief may be granted or seek monetary relief from a defendant who is
2 immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however,
3 must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d. 696, 699 (9th
4 Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two
5 essential elements: (1) that a right secured by the Constitution or laws of the United
6 States was violated, and (2) that the alleged violation was committed by a person acting
7 under color of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

8 In addition to the screening requirements under § 1915A, pursuant to the Prison
9 Litigation Reform Act of 1995 (PLRA), a federal court must dismiss a prisoner's claim, "if
10 the allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state
11 a claim on which relief may be granted, or seeks monetary relief against a defendant
12 who is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for
13 failure to state a claim upon which relief can be granted is provided for in Federal Rule
14 of Civil Procedure 12(b)(6), and the court applies the same standard under § 1915 when
15 reviewing the adequacy of a complaint or an amended complaint. When a court
16 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
17 complaint with directions as to curing its deficiencies, unless it is clear from the face of
18 the complaint that the deficiencies could not be cured by amendment. See *Cato v.*
19 *United States*, 70 F.3d. 1103, 1106 (9th Cir. 1995).

20 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
21 *Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal
22 for failure to state a claim is proper only if it is clear that the plaintiff cannot prove any
23 set of facts in support of the claim that would entitle him or her to relief. See *Morley v.*
24 *Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes
25 as true all allegations of material fact stated in the complaint, and the court construes
26 them in the light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d
27 955, 957 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent
28 standards than formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5,

9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam). While the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is insufficient. *Id.*, see *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

A reviewing court should “begin by identifying pleadings [allegations] that, because they are no more than mere conclusions, are not entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S.Ct. 1937, 1950 (2009). “While legal conclusions can provide the framework of a complaint, they must be supported with factual allegations.” *Id.* “When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. *Id.* “Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

Finally, all or part of a complaint filed by a prisoner may therefore be dismissed *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal conclusions that are untenable (e.g., claims against defendants who are immune from suit or claims of infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual allegations (e.g., fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989); see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

II. DISCUSSION

While plaintiff has used the Court’s civil complaint form for filing a civil rights action pursuant to 42 U.S.C. § 1983, he does not actually allege any federal constitutional violations. However, the Court must construe a pro se litigant’s pleadings liberally. *Balistreri*, 901 F.2d. at 699. Thus, a discussion of his claims in the context of federal constitutional guarantees is appropriate.

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1 **A. The Allegations**

2 Plaintiff raises five claims for relief contending that he has been subjected to
3 “medical neglect and mistreatment that constitute[s] abuse...” (count I), medical neglect
4 and mistreatment by negligence...” (count II), “medical neglect and mistreatment that
5 leads to torture...” (count III), “medical neglect...in the process of a blood draw” (count
6 IV), and “medical neglect that leads to suffering and torture...” (count V). Plaintiff
7 names I.C.E. (Immigrations and Customs Enforcement) and the Henderson Detention
8 Center Medical Staff as defendants in their official capacity.

9 Specifically in count I, plaintiff contends that on April 14, 2012, the night nurse at
10 the detention center gave him the wrong medication and when plaintiff advised the
11 nurse of the mistake, the nurse “becam [sic] very aggressive,” took the mistaken
12 medication away and, in the process of handing plaintiff the correct medication
13 “aggressively pinched” plaintiff’s palm. Additionally, the nurse (John Doe #1, a female),
14 spoke inappropriately to plaintiff.

15 In count II, plaintiff claims that on April 19, 2012, the defendant (nurse John Doe
16 #2) gave plaintiff “too much medicine” and when advised it was too much, the nurse
17 took back the extra dosage. Plaintiff contends the error “could have lead to an
18 overdose.” He does not allege that he suffered any actual harm from this encounter.

19 In count III, plaintiff alleges medical neglect and mistreatment that “leads to
20 torture” by defendant nurses John Doe #1 and John Doe #3. In this instance, on April
21 21, 2012, the nurse (Doe #1) dispensed the wrong medication to plaintiff, which he
22 ingested. Thereafter, plaintiff alleges he “almost had a heart attack” suffered rapid heart
23 beat, raised blood pressure, and a sense of being very high. Upon noticing the
24 symptom, the defendants administered another medication to reduce the blood
25 pressure. Plaintiff complains this medication left him feeling extremely itchy and the
26 itchiness lasted all night. Plaintiff asserts that he is still suffering a “multitude of pains,
27 mentally, physically” and that he has been diagnosed with PTSD.

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1 In count IV, plaintiff alleges that on May 11, 2012, a female nurse (John Doe #4)
 2 came and drew his blood using a very large needle to draw two vials of blood and then
 3 used a second smaller needle in a different vein to draw a third vial. The blood draw did
 4 not go smoothly as the nurse had difficulty finding a vein and plaintiff suffered bruising in
 5 the area. Plaintiff alleges these actions were unprofessional. He does not allege,
 6 however, that he suffered any injury apart from the bruising.

7 In this count, plaintiff also alleges that he “resubmit[ted]” a request to see both a
 8 psychiatrist and a physician, but that neither request was answered.

9 In count V, plaintiff avers that he suffered medical neglect leading to suffering
 10 and torture while in I.C.E. custody. Specifically, plaintiff relates that he notified I.C.E. of
 11 the above-described incidents through grievances and made written requests to see a
 12 physician or psychiatrist, but those requests were not answered. He asserts that he
 13 was unable to complete an interview with a representative from his consulate because
 14 he was “unstayble [sic]” and very sick mentally. Plaintiff alleges that after this interview
 15 he again requested a doctor visit, which request was denied.

16 A week later, after another attempted interview with the consulate, the foreign
 17 representative allegedly requested that I.C.E. get plaintiff treatment before anything else
 18 transpired. Plaintiff advises he saw a psychiatrist on May 24, 2012, and was diagnosed
 19 with posttraumatic stress disorder (PTSD). Plaintiff complains that defendants “let [him]
 20 suffer for over thirty five days before allowing the psychiatric visit.”

21 **B. Section 1983 Legal Standards**

22 To state a claim under 42 U.S.C. § 1983, a plaintiff must plead that the
 23 defendants acting under color of state law deprived plaintiff of rights secured by the
 24 Constitution or federal statutes. *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir.
 25 1986); see also *WMX Techs., inc. v. Miller*, 197 F.3d 367, 372 (9th Cir. 1999) (en banc).
 26 The statute provides:

27 Every person who, under color of any statute, ordinance, regulation,
 28 custom, or usage, of any State or Territory or the District of Columbia,
 subjects, or causes to be subjected, any citizen of the United States or

1 other person within the jurisdiction thereof to the deprivation of any rights,
 2 privileges, or immunities secured by the Constitution and laws, shall be
 3 liable to the party injured in an action at law, suit in equity, or other proper
 proceeding for redress. . . .

4 42 U.S.C. § 1983. As previously noted, plaintiff does not plead these required
 5 elements, but because plaintiff used the civil rights form, is pro se and a foreign national
 6 likely unfamiliar with the applicable constitutional provisions, the Court shall construe
 7 the claims as arising under the Eighth Amendment's prohibition of cruel and unusual
 8 punishment.

9 **C. Unconvicted Detainee and the Eighth Amendment**

10 Plaintiff is an immigration detainee who has not been adjudicated a criminal.
 11 Therefore his claims must be viewed through the filter of due process as guaranteed
 12 under the Fourteenth Amendment. The Fourteenth Amendment affords pretrial
 13 detainees protections from excessive force and violence at least as strong as those
 14 afforded under the Eighth Amendment. *City of Revere v. Massachusetts General*
 15 *Hosp.*, 463 U.S. 239, 244 (1983). "Under the Due Process Clause, detainees have a
 16 right against conditions or restrictions that "amount to punishment." *Pierce v. County of*
 17 *Orange*, 526 F.3d 1190, 1205 (9th Cir. 2008). Thus, if denial or undue delay of medical
 18 care would amount to punishment, the Eighth Amendment standard applies.

19 "Denial of medical attention to prisoners constitutes an [E]ighth [A]mendment
 20 violation [only] if the denial amounts to deliberate indifference to serious medical needs
 21 of the prisoners." *Toussaint v. McCarthy*, 801 F.2d 1080, 1111(9th Cir. 1986), abrogated
 22 in part on other grounds by *Sandin v. Connor*, 515 U.S. 472 (1995) (citing *Estelle v.*
 23 *Gamble*, 429 U.S. 97, 106 (1976)); see also *Jett v. Penner*, 439 F.3d 1091, 1096 (9th
 24 Cir. 2006); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other
 25 grounds by *WMX Techs., Inc. v. Miller*, 104 F.3d 1133 (9th Cir. 1997) (en banc). Prison
 26 officials are deliberately indifferent to a prisoner's serious medical needs when they
 27 "deny, delay, or intentionally interfere with medical treatment.... Mere negligence in
 28 diagnosing or treating a medical condition, without more, does not violate a prisoner's

1 Eighth Amendment rights." *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000)quoting
2 *Estelle v. Gamble*, 429 U.S. 97, 104 S.Ct. 285(1976).

3 Negligence in treating a medical condition, however, does not state a valid claim
4 of denied medical care under the Eighth Amendment. Medical malpractice does not
5 become a constitutional violation merely because the victim is a prisoner. *Estelle v.*
6 *Gamble*, 429 U.S. 97, 106 (1976); see also *Jett*, 439 F.3d at 1096; *Toguchi v. Chung*,
7 391 F.3d 1051, 1057, 1060 (9th Cir. 2004) (stating that "[d]eliberate indifference is a
8 high legal standard."); *Clement*, 298 F.3d at 904-05. Isolated occurrences of neglect
9 do not constitute deliberate indifference to serious medical needs. See *Jett*, 439 F.3d at
10 1096; *McGuckin*, 974 F.2d at 1060; *O'Loughlin v. Doe*, 920 F.2d 614, 617 (9th Cir.
11 1990); *18 Unnamed "John Smith" Prisoners v. Meese*, 871 F.2d 881, 883 n.1 (9th Cir.
12 1989); *Toussaint*, 801 F.2d at 1111. Even gross negligence is insufficient to establish
13 deliberate indifference to serious medical needs. See *Toguchi*, 391 F.3d at 1060.

14 Plaintiff's allegations relating to the dispensing of his medication and to the blood
15 draw are, on their face, insufficient to state a federal constitutional violation. Negligent
16 nursing practice which causes pain, but which is done in an attempt to treat plaintiff's
17 medical condition, does not show a deliberate indifference to a significant medical need.
18 Plaintiff has not stated a claim for relief under § 1983 on the facts alleged in counts I
19 through IV. Those claims shall be dismissed.

20 As to count V, delay of, or interference with, medical treatment can amount to
21 deliberate indifference. See *Jett*, 439 F.3d at 1096; *Clement*, 298 F.3d at 905. Where
22 the prisoner is alleging that delay of medical treatment evinces deliberate indifference,
23 however, the prisoner must show that the delay led to further injury. See *Hallett*, 296
24 F.3d at 745-46; *McGuckin*, 974 F.2d at 1060; *Shapley v. Nev. Bd. of State Prison*
25 *Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) (per curiam).

26 Plaintiff has alleged that his requests to see a mental health professional or
27 psychiatrist were ignored for more than 35 days. He implies, but does not state outright,
28 that the negligent medical treatment he received caused the PTSD. Moreover, while he

1 claims that he suffered extreme mistreatment and torture, the acts described do not
2 amount to that as it is implausible that such minor acts or harms as pinching his palm or
3 causing a bruise while drawing blood could be the cause of this diagnosis. See
4 *Ashcroft v. Iqbal*, 556 U.S. at 678-79, 129 S.Ct. at 1950. Count V shall also be
5 dismissed for failure to state a claim for which relief may be granted under the Civil
6 Rights Act, 42 U.S.C. § 1983.

7 Plaintiff's amended complaint shall be dismissed without prejudice. Plaintiff will
8 be given an opportunity to amend his complaint once more if he believes he can provide
9 sufficient additional facts to meet the elements of a § 1983 claim for violation of his
10 rights under the Eighth Amendment.

11 **III. CONCLUSION**


12 Plaintiff's complaint fails to state a claim for which relief may be granted under 42
13 U.S.C. § 1982. His claims may be viable under some state law theory,¹ but this Court
14 shall not exercise its supplemental jurisdiction where no federal claim or other
15 circumstances exist to establish the Court's primary jurisdiction. See 28 U.S.C. § 1331
16 *et seq.*; 1367(c). Plaintiff will be given an opportunity to amend the complaint. If plaintiff
17 elects to proceed in this action by filing an amended complaint, he is advised that he
18 should specifically identify each defendant to the best of his ability, clarify what
19 constitutional right he believes each defendant has violated and support each claim with
20 factual allegations about each defendant's actions. There can be no liability under 42
21 U.S.C. § 1983 unless there is some affirmative link or connection between a
22 defendant's actions and the claimed deprivation. *Rizzo v. Goode*, 423 U.S. 362 (1976);
23 *May v. Enomoto*, 633 F.2d 164, 167 (9th Cir. 1980); *Johnson v. Duffy*, 588 F.2d 740,
24 743 (9th Cir. 1978). Plaintiff's claims must be set forth in short and plain terms, simply,
25 concisely and directly. See *Swierkeiwicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002);
26 Fed. R. Civ. P. 8.

27 ¹The Court makes no finding that plaintiff presents any claim that would be viable
28 under state law.

1 Plaintiff is informed that the Court cannot refer to a prior pleading in order to
2 make plaintiff's amended complaint complete. Local Rule 15-1 requires that an
3 amended complaint be complete in itself without reference to any prior pleading. This is
4 because, as a general rule, an amended complaint supersedes the original complaint.
5 See *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended
6 complaint, the original pleading no longer serves any function in the case. Therefore, in
7 an amended complaint, as in an original complaint, each claim and the involvement of
8 each defendant must be sufficiently alleged.

9 IT IS THEREFORE ORDERED that the Amended Complaint is dismissed without
10 prejudice. The Clerk shall send to plaintiff a form and instructions for preparing and
11 filing a civil rights complaint. Plaintiff shall have thirty (30) days from entry of this order
12 to file his Second Amended Complaint. It shall be entitled Second Amended Complaint
13 and shall reference the case number assigned to this action. Failure to timely file the
14 Second Amended Complaint will result in dismissal of this action with prejudice.

15 DATED THIS 24th day of October 2012.

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MIRANDA M. DU
UNITED STATES DISTRICT JUDGE
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